



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Regenesis Corporation
1994 Maple Street
West Hopkinton, NH 03229

Re: Solid Waste Permit No. DES-SW-SP-002
Bio Energy Solid Waste Facility
West Hopkinton

**AMENDED
NOTICE OF PROPOSED
LICENSE ACTION**

No. 04-010

MARCH 4, 2005

I. INTRODUCTION

This Amended Notice of Proposed License Action is issued by the Department of Environmental Services, Waste Management Division ("DES") to Regenesis Corporation, pursuant to RSA 541-A:30, II and Env-Wm 306.03. DES is proposing to revoke Solid Waste Permit No. DES-SW-SP-002 held by Regenesis Corporation for the Bio Energy Solid Waste Facility in West Hopkinton, NH based on the violations alleged below. This notice amends the original notice issued in this action on November 22, 2004. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Regenesis Corporation ("Regenesis") is a corporation registered to do business in New Hampshire having a mailing address of 1994 Maple Street, West Hopkinton, NH 03229.

III. SUMMARY OF FACTS AND LAW SUPPORTING PROPOSED ACTION

1. Pursuant to RSA 149-M, DES regulates the management and disposal of solid waste. Pursuant to RSA 149-M:7, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Wm 100 – 300, 2100 *et seq.* ("Solid Waste Rules") to implement this program.
2. Pursuant to RSA 149-M:9, any person who wishes to construct, operate, or initiate closure of a public or private solid waste facility must first obtain a permit from DES. Under RSA 149-M:9, XII, no solid waste permit may be transferred to any other person without prior written approval of DES.
3. Under RSA 149-M:9, IX(a), DES may deny a solid waste permit application if the applicant "fails to demonstrate sufficient reliability, expertise, integrity, and competence to

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operate a solid waste facility.”

4. Under RSA 149-M:9, IX(c), DES may deny a solid waste permit application “[i]n the case of a corporation or business entity, if any of its officers, directors, partners, key employees or persons or business entities holding 10 percent or more of its equity or debt liability has been convicted of ... a felony in any state or federal court during the 5 years before the date of the permit application.”

5. Pursuant to RSA 149-M:9, III, upon request of DES “the attorney general shall conduct a background investigation of the performance history and criminal record of the applicant and of its officers and directors, if any, and make a report to the department.” DES may also request a background investigation of the applicant in conjunction with an application to transfer a permit. RSA 149-M:9, XII(a).

6. Env-Wm 316 specifies which entities and individuals must complete personal history disclosure forms and what information must be provided, and directs that these forms be submitted directly to the Attorney General’s Office (“AGO”), rather than to DES.

7. Env-Wm 303.14(a) and (b)(1) require an applicant for a solid waste permit to certify that no individual holding 10% or more of the applicant’s debt or equity, and none of the applicant’s officers, directors, partners or managers, have been convicted of a felony during the 5 years before the date of the application.

8. Env-Wm 316.02(a)(3) specifically requires certification under Env-Wm 303.14 for applications to transfer ownership or operational control of a solid waste facility. By operation of Env-Wm 315.08, which establishes the existing permittee and the proposed permittee as co-applicants for a permit transfer, the certification is required for both the existing permittee and the proposed permittee.

9. Env-Wm 303.15 provides that applicants unable to certify compliance pursuant to Env-Wm 303.14 must instead submit a compliance report explaining the circumstances which prevent certification and the reason(s) why those circumstances should not be grounds for denying the requested approval.

10. On October 9, 2001, Bio Energy Corporation (“Bio Energy”) submitted an application for a solid waste facility permit for a facility located at 2003 Maple Street in West Hopkinton, N.H. (“Bio Energy Facility”).

11. On October 16, 2001, Anthony DiNapoli, also known as Antonio DiNapoli, submitted a Personal History Disclosure Form to the AGO in connection with Bio Energy Corporation’s application.

12. Mr. DiNapoli’s responses on the form included a sworn statement that he had no criminal convictions (motor vehicle offenses excepted).

13. On October 18, 2001, Mr. DiNapoli was indicted in Hillsborough County Superior Court for witness tampering, a felony.

14. On November 5, 2001, the AGO performed a criminal record check on Mr. DiNapoli. The

search revealed nothing inconsistent with Mr. DiNapoli's response on the form. There was no indication of the recently filed charges.

15. On January 28, 2002, while the solid waste facility application was pending, the Directors of Bio Energy unanimously approved a plan of liquidation for the company, which stated an effective dissolution date of August 31, 2002.

16. In response to an inquiry from the AGO in early March of 2002, prompted by a March 7, 2002 newspaper article indicating that the Bio Energy facility was closing, Bio Energy confirmed that the article was accurate but stated that the company wished to go forward with the solid waste permit application process and intended eventually to transfer the solid waste permit to another company.

17. On March 20, 2002, the AGO conveyed the results of its Bio Energy background investigation to DES.

18. On March 25, 2002, Mr. DiNapoli was convicted in Hillsborough County Superior Court of witness tampering, a felony. The conviction was affirmed by the New Hampshire Supreme Court in State v. DiNapoli, 149 N.H. 514 (2003).

19. On May 28, 2002, DES issued Solid Waste Permit No. DES-SW-SP-002 ("the Permit") to Bio Energy, without knowledge of Mr. DiNapoli's felony conviction.

20. On June 12, 2002, Bio Energy executed a Purchase and Sale Agreement conveying the Bio Energy Facility, including the buildings, the underlying property, most of the facility's equipment and machinery, and "to the extent transferable, all permits, licenses, authorizations and approvals issued or granted to Seller by any governmental agency . . ." to a new entity, Bio Energy, LLC. The Permit was specifically listed as one of the transferred assets. The agreement was executed on behalf of both buyer and seller by William Dell'Orfano. Mr. Dell'Orfano was listed as President of Bio Energy Corporation, and Manager of Bio Energy, LLC.

21. In mid-June of 2002 both Mr. Dell'Orfano and Bio Energy/Regenesis official Harry Smith urged Mr. DiNapoli to resign from Bio Energy Corporation due to concerns about how the felony conviction might impact the company's solid waste facility Permit.

22. Mr. DiNapoli did not resign from Bio Energy, LLC. From at least August 30, 2002 to the present, Mr. DiNapoli has been a member and a creditor of Bio Energy, LLC. From July 29, 2003 to the present, Mr. DiNapoli has also been a managing member of Bio Energy, LLC.

23. On or about July 1, 2002, Bio Energy submitted a request to the Air Resources Division ("ARD") of DES to transfer the Title V air permit from Bio Energy Corporation to Bio Energy, LLC. Under the applicable administrative rules, a change in ownership for purposes of a Title V permit is considered an Administrative Permit Amendment, and does not require a background investigation.

24. On August 30, 2002, Bio Energy Corporation filed Articles of Dissolution with the New Hampshire Secretary of State.

25. During the fall of 2002, Bio Energy asked DES to transfer its Hazardous Waste

Identification Number, its registration for four aboveground storage tanks, and its certification of waste-derived product from Bio Energy Corporation to Bio Energy, LLC. None of the programs notified of the change required a background investigation in conjunction with a change of ownership. In correspondence associated with the name change, Bio Energy indicated that “[e]ffective September 1, 2002 all of the assets owned by Bio Energy Corporation were transferred to Bio Energy LLC.” However, Bio Energy did not apply to the DES solid waste program for permission to transfer the solid waste Permit to Bio Energy, LLC.

26. Bio Energy had originally applied for a solid waste permit in 2001 because it proposed to burn waste wood material classified as solid waste, which made the operation an incineration facility under the solid waste rules. The company did not propose to process wood material into wood fuel chips at the Bio Energy facility, and no permit was issued for that activity.

27. According to the facility’s Title V air permit issued by the ARD, the “significant activities” at the facility consist of operation of a wood-fired boiler and circulation water cooling tower.

28. As a practical matter, the activity allowed under the solid waste permit was the same as the activity allowed under the air permit: burning fuel generated from waste wood material to create electricity.

29. On December 2, 2002, Bio Energy Corporation, Bio Energy, LLC and Regenesi Corporation filed with DES an application to transfer the Permit to Regenesi (“the Transfer Application”). All three corporations gave the same mailing address of 1994 Maple Street, West Hopkinton, NH 03229, and the check that accompanied the application was from a Bio Energy, LLC account. Corporate officials represented to DES and the AGO that the four individuals who would be required to complete Personal History Disclosure Forms had already completed the forms in connection with the Bio Energy background investigation. With the exception of Mr. DiNapoli, the officers and directors of Regenesi Corporation were the same as the officers and directors of Bio Energy.

30. On the Transfer Application, William Dell’Orfano signed, on behalf of both the existing permittee and the proposed permittee, the certification required under Env-Wm 303.14. Specifically, this included a certification that none of Bio Energy’s officers or directors had been convicted of a felony during the five years before the date of the application. None of the statements on either certification were circled as untrue, and no Compliance Reports or explanations were attached.

31. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy inform the DES solid waste program that the company had been dissolved.

32. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesi inform the DES solid waste program of the purported transfer of the Permit to Bio Energy, LLC.

33. Nowhere on the Transfer Application, and at no point during that application process, did Bio Energy or Regenesi inform the DES solid waste program that other environmental permits associated with the facility were held not by Regenesi but by Bio Energy, LLC.

34. Nowhere on the Transfer Application, and at no point during that application process, did

Bio Energy or Regenesiis inform the DES solid waste program that Mr. DiNapoli had been convicted of a felony, that he had resigned from any company, or that there were any concerns about his continued involvement with the facility.

35. During the Transfer Application process, Regenesiis corporate officials led the DES solid waste program to believe that Mr. DiNapoli was in the process of divesting himself from involvement with the Bio Energy facility. They did not inform the program when Mr. DiNapoli later became a managing member of Bio Energy, LLC.

36. On the Transfer Application, Mr. Dell'Orfano signed the following statement on behalf of both the existing permittee (Bio Energy Corporation) and the proposed new permittee (Regenesiis): "To the best of my knowledge and belief, the information and material submitted herewith is correct and complete. I understand that any approval granted by DES based on false and/or incomplete information shall be subject to revocation or suspension, and that administrative, civil or criminal penalties may also apply."

37. Under Env-Wm 306.04(a), a permit shall be revoked if DES determines, following notice and opportunity for hearing, that there is good cause for revocation and that "[t]here are no circumstances by which the permittee can correct or eliminate the underlying problem"

38. Env-Wm 306.05 specifies the circumstances which provide "good cause" for revoking a permit. These circumstances include violation of chapter RSA 149-M or the Solid Waste Rules (RSA 149-M:12, III; Env-Wm 306.05(a)), discovery that a permit was issued based on false or misleading information (Env-Wm 306.05(b)), or meeting any other criteria for permit denial (Env-Wm 306.05(c)).

39. Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, IX(a).

40. Criteria for permit denial also include conviction of the permittee or one of its officers or directors during the five years prior to the application, per RSA 149-M:9, IX(c).

41. Because Mr. DiNapoli was an officer or director of Bio Energy when he was convicted of felony witness tampering on March 25, 2002, Mr. Dell'Orfano made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.

42. In an effort to avoid disclosure of Mr. DiNapoli's felony conviction, Bio Energy/Regenesiis officials applied to transfer the Permit to an entity with which Mr. DiNapoli was not involved, did not inform the agency that Mr. DiNapoli had resigned or that they had concerns about his fitness to participate in management of the company, and misled DES staff about Mr. DiNapoli's ongoing involvement with the facility. These representations and omissions were false or misleading.

43. Even if Regenesiis can show that Mr. DiNapoli resigned from Bio Energy Corporation prior to Mr. Dell'Orfano's certification, it was misleading for the company not to disclose the conviction in connection with the Transfer Application. Mr. DiNapoli continued to be involved with the facility through Bio Energy, LLC, to a degree that would have necessitated disclosure

had the Permit been transferred to that entity. As a practical matter, a person could not be involved in the “facility” for purposes of the air permit without also being involved in the “facility” for purposes of the solid waste permit.

44. Further, it was misleading for Regenesis not to inform DES that the company holding the Permit had been dissolved three months prior to the application, that the Permit had purportedly been conveyed without DES approval to Bio Energy LLC in June of 2002, and that other environmental permits for operation of the same facility as the solid waste Permit were held by a different entity.

45. The solid waste rules and transfer application form provide an avenue for disclosing information such as environmental violations and criminal convictions, through submission of a Compliance Report. It was reasonable for the DES solid waste program to expect that an applicant with concerns about disqualifying information would bring it to the agency’s attention through such a report, as requested on the form.

46. In making its decision to transfer the Permit, the DES solid waste program reasonably relied upon the false or misleading information supplied by Regenesis officials. Because of this reliance, the DES solid waste program did not ask the AGO to investigate Mr. DiNapoli’s background again in conjunction with the Transfer Application. As a result, the agency continued to be unaware of Mr. DiNapoli’s felony conviction, and had no reason to believe there was any significance to the fact that he was involved with Bio Energy LLC but not with Regenesis.

47. The fact that Regenesis officials supplied DES with false or misleading information, as alleged more specifically in paragraphs 1-46 above, calls into question whether the company has sufficient reliability and integrity to operate a solid waste facility.

48. RSA 149-M:9, VIII requires the applicant for a solid waste facility permit to notify abutters of the public hearing on the application in writing by certified mail, return receipt requested.

49. Env-Wm 303.05(d) requires that, if the applicant or the owner of the facility site owns any abutting parcel of land, the notice of filing shall be sent to the owner(s) of the next parcel(s) not owned by the applicant or facility site owner.

50. In a petition filed in the matter of Citizens for a Future New Hampshire v. Bio Energy, LLC, et al. (Merrimack County Superior Court No. 04-E-387), a citizens group (“CFNH”) whose members allegedly include property owners near the Bio Energy Facility alleges that Bio Energy did not comply with Env-Wm 303.05(d).

51. CFNH alleges that certain companies owning property abutting the Bio Energy facility are under the same or related ownership as Bio Energy, and that the owners of property beyond those parcels should have received notice as abutters. Specifically, CFNH alleges that Bedford Corp., which owned two parcels abutting the Bio Energy parcels in December 2002 when Bio Energy applied to transfer the permit to Regenesis and in February 2003 when Regenesis applied to modify the permit, is affiliated with and receives mail at the same address as Bio Energy and Regenesis. CFNH further alleges that certain residential property owners who own property abutting the Bedford Corp. parcels should have received notice of those applications under Env-Wm 303.05(d).

52. By statute, DES is charged with conducting fair and procedurally proper permit proceedings. Accordingly, CFNH's allegations are of concern to the agency. If true (and the agency by referencing them makes no admission or acknowledgment of their truth or falsity), the allegations could be grounds for reopening the permit transfer and modification proceedings, independent of the possible grounds for revocation described elsewhere in this notice.

53. Therefore, DES orders that, should Regenesis choose to contest the proposed revocation, the company also show cause why the original abutter notification was legally sufficient, and if not, why the applications should not be reopened to provide proper notice.

IV. VIOLATIONS ALLEGED

1. William Dell'Orfano made a false or misleading statement when he certified on December 2, 2002 that none of Bio Energy's officers or directors had been convicted of a felony in the five years prior to the application for permit transfer.
2. Regenesis officials' false or misleading statements and omissions to DES in the course of the permit proceedings call into question whether Regenesis has the reliability and integrity to operate a solid waste facility.

V. PROPOSED ACTION

1. Under the circumstances, the permittee cannot correct the underlying problem. Therefore, DES proposes to revoke the Permit.
2. DES further orders Regenesis to show cause why, if the permit is not revoked, the 2003 application for permit modification should not be reopened based on inadequate notice to abutters.

VI. HEARING


Regenesis has the right to a hearing to contest these allegations before the proposed license action is taken. A hearing on this matter has been scheduled for April 18, 19, and 20, 2005 beginning at 9:30 a.m. in **Room C-112/113** of the DES offices at 29 Hazen Drive, Concord, N.H. This hearing shall also serve as the opportunity for Regenesis to show cause as provided in paragraph V.2, above.

This hearing will be a formal adjudicative proceeding conducted pursuant to RSA 541-A:31 and Env-C 204. At the hearing, Regenesis and any witnesses Regenesis may call will have the opportunity to present testimony and evidence as to why the proposed action should not be taken. All testimony at the hearing will be under oath and will be subject to cross-examination.

RSA 541-A:31, III(e) provides that Regenesis has the right to have an attorney present to represent Regenesis at its own expense. Copies of this amended notice are being sent to the company's attorneys, as well as to the attorneys for all intervenors in this ongoing proceeding.

Pursuant to Env-Wm 306.03(c)(2)b., if Regenesis fails to appear at the hearing, the revocation will become effective as of the date of the hearing.

Anyone having questions regarding this matter should contact Senior Assistant Attorney General Jennifer J. Patterson at 271- 3679.


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